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IN THE

Supreme Court of the United States

October Term, 1966

No. 646

INDIANA & MICHIGAN ELECTRIC COMPANY,
Petitioner,

against

FEDERAL POWER COMMISSION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND APPENDICES

RICHARD M. DICKE
ROLON W. REED
ANTHONY L. FLETCHER
Attorneys for Petitioner
120 Broadway
New York, New York 10005

SIMPSON THACHER & BARTLETT,
Of Counsel

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FEDERAL POWER COMMISSION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner respectfully prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above-entitled proceeding.

Opinions Below

The opinions issued by the Court of Appeals are reported at —— F.2d —— and are printed in Appendix A, hereto. The unreported judgment of the Court of Appeals is printed in Appendix B, hereto.

The opinion of Respondent, Federal Power Commission and its original order herein are reported at 33 F.P.C. 739 and are printed at pp. 721-743 (R. 16538-16552) of the Joint Appendix (vol. II) submitted to the Court below, nine copies of which are filed herewith pursuant to Rule 21, par. 4, of this Court. The FPC Opinion and Order Denying Rehearing are reported at 33 F.P.C. 1252 and printed at pp. 767-769 (R. 16590-91) of the Joint Appendix (vol. II). The FPC Presiding Examiner's decision is reported at 33 F.P.C. 752 and printed at pp. 633-717 (R. 16154-16228) of the Joint Appendix (vol. II).

Jurisdiction

The judgment of the Court of Appeals was dated July 13, 1966 and entered on July 13, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) and Section 313(b) of the Federal Power Act, 16 U.S.C. §825*l*(b).

Questions Presented

1. Whether the Commission's use of one standard for judging prehearing discovery applications by its Staff (materiality and relevancy) resulting in almost unlimited discovery, and its use of a different standard for judging such discovery applications by Petitioner (need to know) resulting in a complete denial of discovery, was consistent with the requirements of either Section 12 of the Administrative Procedure Act (5 U.S.C.A. §1011) or due process of law.

2. Whether the Commission denied Petitioner a fair hearing by its repeated in-hearing foreclosure of attempts

by Petitioner to show (1) that the sales in question had for years been considered by the Commission Staff, the only source of continuing expert knowledge of the subject, to be in intrastate commerce and not subject to federal regulation, and (2) that the conclusions advanced for the first time in this case to support jurisdiction were not accepted by certain of those only other experts in the field in question.

3. Whether, under a statute (Federal Power Act §201, 16 U.S.C. §824) defining electric energy transmitted in interstate commerce as such energy which has been transmitted from a state and consumed at a point outside thereof, wholesale sales of electric energy may be determined to be "in interstate commerce" and therefore subject to federal jurisdiction (Federal Power Act §201) "where a public utility participates in and is dependent upon an integrated interstate power pool" (R. 16538), and without proof "that out-of-state energy reaches the wholesale customers" (*infra*, p. 8a).

4. Whether, if proof "that out-of-state energy reaches the wholesale customers" is required to prove that sales are in interstate commerce, "substantial evidence" (Federal Power Act §313(b), 16 U.S.C. §825*l*(b)) of such fact is provided by (1) proof of electric characteristics of interconnected system operation which it was conceded to the Court below did not prove that out-of-state energy reached the individual wholesale customers, and (2) a method of hour-by-hour analysis predicated upon data which its sponsoring witness conceded "do not even suggest or tell what happened during the hour for which the data were used" (R. 1785).

5. Whether the exemption from federal jurisdiction of "facilities used in local distribution" (Federal Power Act §201, 16 U.S.C. §824) which has been declared to be "a limitation on FPC jurisdiction" over "sales of electric energy at wholesale in interstate commerce" (*F.P.C.* v. *Southern California Edison Co.*, 376 U. S. 205, 210 n. 6) is a limitation on FPC jurisdiction over sales of electric energy at wholesale in interstate commerce.

6. Whether, in any event, the Federal Power Act, despite Congress' and the Commission's expressed views to the contrary, confers upon the Commission jurisdiction to regulate sales constitutionally subject to regulation, and in fact regulated, by State authorities under the tests prescribed by this Court (*Peoples Natural Gas Co.* v. *Public Serv. Comm'n*, 270 U.S. 550).

Statutes Involved

The Fifth Amendment to the Constitution of the United States, insofar as it is here relevant, provides that "No person shall * * * be deprived of life, liberty, or property, without due process of law. * * *" The following statutes and their official citations are printed in Appendix C, hereto, *infra*:

Sections 201, 205, 206, 307, 308 and 313(b) of the Federal Power Act, 16 U. S. C. §§824, 824d, 824e, 825f, 825g and 825*l*(b).

Section 12 of the Administrative Procedure Act, 5 U. S. C. A. §1011.

Rule 23(a) of the Federal Power Commission's Rules of Practice and Procedure, 18 C. F. R. §1.23(a).

Statement

The proceeding which led to the 2-1 decision of the Court of Appeals was commenced on April 16, 1963, by an order (pursuant to Sections 205, 206, 308 and 309 of the Federal Power Act) for Indiana & Michigan Electric Company,* Petitioner herein, to show cause why certain sales by it of electric energy should not be held to be in interstate commerce and subject to the regulatory jurisdiction of the Commission (R. 5-10).**

Petitioner is an investor-owned electric utility, incorporated, owning most of its property, and doing most of its business, in the State of Indiana, but also serving a small number of customers in the southwest corner of the State of Michigan (R. 1210, 1214, 1225-26, 12484). It is affiliated with five other investor-owned electric utilities in what is known as the American Electric Power System, a holding company system having varying kinds and sizes of generating units interconnected by transmission lines spanning seven states and operated on a coordinated basis to provide the capacity and energy necessary to meet the many particular demands for electric energy placed upon the system (R. 1119). Although part of the American Electric Power System, Petitioner has capacity of its own for generating electric energy in the State of Indiana substantially in excess of the demand for such energy placed

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* Sometimes referred to herein as "I & M".

** Section 201 of the Federal Power Act provides that the Commission shall have jurisdiction over "* * * the transmission of electric energy in interstate commerce and * * * the sale of electric energy at wholesale in interstate commerce. * * * The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction * * * over facilities used in local distribution. * * *".

on its system by its customers in Indiana and Michigan (R. 3037).

All electric energy transactions between Petitioner and other public utilities with whom it is connected are effected pursuant to contracts which have been filed with and regulated by FPC since at least 1945 (R. 1288-1294, 14451-14893).

Petitioner serves some 300,000 customers (R. 1214), including 14 municipal electric systems and seven rural electric cooperative systems in Indiana and two municipal electric systems and one rural electric system in Michigan (R. 1230). Most of the service to such municipal and cooperative customers is at wholesale for resale and has been reported annually by Petitioner and its predecessors to the Commission since 1938 (R. 1297-99); the rates for such sales have been regulated by the Public Service Commissions of Indiana (since 1924) and Michigan (since 1927) (R. 1304-05). It is the sales to these wholesale customers of Petitioner which are at issue herein.

Over a five-month period prior to formal hearings, the Commission's Staff conducted extensive investigations of the facilities and records of Petitioner, of American Electric Power, and of other utility companies. Pursuant to orders and subpoenas issued by the Commission and its Hearing Examiner, the Staff procured many thousands of documents relating to I & M's and a number of other companies' operations (R. 16-22, 151, 178-79, 493-500, 507-31). Staff's requests for such orders and subpoenas were tested against the standards prescribed for such discovery by Commission Rules of Practice and Procedure (18 C. F. R. §1.23(a))—relevancy and materiality—with one exception.*

* The Hearing Examiner did on one occasion (R. 563-77) order I & M to produce documents even after a finding (R. 574-75) that their relevance and materiality had not been demonstrated.

During the same period, I & M, recognizing that (in the words of the Commission's expert witness) "* * * the field of jurisdiction, or engineering involving jurisdiction, is very specialized and very narrow * * *" (R. 1564), and that the only source of continuing authoritative knowledge in this "very specialized and very narrow" field of engineering was the staff of the Commission, sought by numerous applications to discover from various Commission sources certain engineering studies, reports and other data pertaining to whether sales for resale were "in interstate commerce" or were made over facilities "used in local distribution." Each such application was totally denied. The collective denials were eventually justified not on the grounds prescribed by Commission Rules and applied to Staff requests for discovery (materiality and relevancy),* but rather on the basis that I & M "ha[d] shown no need for pre-hearing discovery" (R. 16549).

During the subsequent hearing, petitioner was consistently foreclosed from attempting to demonstrate its belief that FPC's own experts had for thirty years considered the sales in question to not be in interstate commerce and that some still did. Such a showing of continuing administrative interpretation of the Act, it was felt, would be pertinent to the weight to be given the contrary conclusion of the one expert who did testify (R. 2316), especially since it was conceded that petitioner's operations had remained unchanged in principle for over two decades (R. 1449, 16183), and that during that time there had been

* Indeed, it was conceded at least twice (R. 16061, 16207) that much of the material I & M sought related "to issues raised by the Order to Show Cause herein and various other specified orders and official communications of the Commission."

no relevant engineering or scientific breakthroughs known to that expert (R. 2320-21).

After extensive hearings, the Hearing Examiner, Commission and two judges of the Court below each concluded, for various and different reasons, that the sales in issue were jurisdictional.

Reasons for Granting the Writ

1. The Commission's denial to petitioner of a right to prehearing and in-hearing discovery equal to that afforded to its own Staff is such a departure from the accepted and usual course of judicial and administrative proceedings as to call for an exercise of this Court's power of supervision.

Petitioner and its affiliates were in possession of much of the factual data required by Commission's Staff to analyze the jurisdictional problems in this case. Similarly, the Commission Staff was the only repository of the specialized studies and information necessary to apply engineering principles to such data. As the only Staff engineering witness conceded, "the field of jurisdiction, or engineering involving jurisdiction, is very specialized and very narrow, and there are very few opportunities where such information could be used or of value" (R. 1564).

During the prehearing period, Staff was afforded access to voluminous data of Petitioner and other affiliated or interconnected electric systems, several thousand pages of which were included by Staff in the record of this proceeding. At the same time, Petitioner vainly sought either oral or documentary discovery relating to applicable engineering studies and reports from some appropriate person at the only available source—the Commission Chairman (who was

publicly announcing what appeared to be new administrative standards for determining jurisdiction*), or the Commission Secretary (who was the logical custodian of much of the information sought), or a Staff expert who was known to possess much of the information sought (R. 15705-721).

By virtue of Section 12 of the Administrative Procedure Act, 5 U.S.C.A. §1011, Petitioner had a right to take pretrial depositions under Federal Power Act §307(d) and to seek both oral and documentary pre-hearing discovery under Section 1.23(a) of the Commission's Rules of Practice and Procedure (18 C.F.R. §1.23(a)) on terms equal to those afforded the Commission Staff. The Commission has justified its disparate treatment of Petitioner and its own Staff with regard to prehearing discovery on the ground that Petitioner had shown "no need" for such discovery (R. 16549). In judging this excuse, however, it must be remembered (1) that the rules, which are required to be followed in hearings by Section 308(a) of the Power Act, provide that the standards for judging such applications should be materiality and relevancy—not "need", and (2) that while those and only those prescribed standards were applied to the Commission Staff's prehearing applications, the additional, illegal and probably impossible, test of "need" was applied to Petitioner's numerous applications despite the Administrative Procedure Act's injunction that "all requirements and privileges relating to evidence or procedure shall apply equally to agencies and persons."

* See, *e.g.*, Swidler, Joseph C., Chairman, Federal Power Commission, "Electric Power Interconnections and Grid Systems", address before the National Association of Railroad and Utilities Commissioners, New Orleans, Louisiana, November 14, 1962; Hearings on H.R. 8747 before the House Sub-committee of the Committee on Appropriations, 88th Cong., 2d Sess. (1964), p. 339.

The U. S. District Court for the Northern District of Indiana* has well characterized Petitioner's position in a statement quoted in part in the dissent below.

> "* * * this Court is not unmindful of the fact that the record in the instant case constitutes an alarming example of how a private litigant before an administrative agency may be denied the opportunity to pursue the orderly procedures so vital to our traditional notions of fair play. Contentions advanced by counsel for the Commission throughout the hearings in this cause afford this Court no nourishment to hold as we must. Counsel for the Commission contended that the plaintiff did not specifically designate the various documents sought. It would be strange, indeed, if the plaintiff could designate the dates and authors of the various engineering reports which it has never been given an opportunity to examine. Likewise, the possibility of permitting restricted discovery on the day of trial affords the experienced trial practitioner no effective remedy at all. This is especially true where much of the data sought consists of long and detailed engineering and rate studies." *Indiana & Michigan Electric Co.* v. *FPC*, 224 F. Supp. 166, 170 (N.D. Ind. 1963).

This situation was aggravated by the limited cross-examination permitted at the hearings. For every time Petitioner established the existence of a document relating to engineering or scientific standards or data employed in determining FPC jurisdiction, the inquiry was forthwith foreclosed, production of the documents denied,

* Petitioner had sought to enforce its believed right to equal treatment and prehearing discovery in the United States District Court for the Northern District of Indiana; the Court reluctantly held that, since Petitioner had not then exhausted possible administrative remedies, it did not have jurisdiction to grant such relief.

and the names of FPC engineers who had prepared the documents, employed the standards or made the determinations, uniformly withheld. As a result it was made impossible to subpoena these people or otherwise to show from objective evidence that under the standards employed by FPC in *every* previous case to determine the extent of its jurisdiction the sales in issue were considered by FPC's own experts for 30 years to be in intrastate commerce.

Such proof would be highly pertinent to the weight to be given the new and different conclusion reached in this case, especially when it rests so heavily on the Commission's presumed, but adamantly unexplained, expertise in this field, and upon legal standards which, at the very least, depart from continuously applied FPC interpretations as well as from the established course of decisions by this Court (*infra*).

The Commission's determination in this, an adversary proceeding, to afford its Staff access to virtually all data available to Petitioner, and to deny Petitioner in the preparation and presentation of its case access to necessary data and knowledge freely available to its Staff, merits careful review by this Court.

2. The basis for FPC jurisdiction applied in this case, and the rejection of the "local distribution" exemption, by both the Commission and the court below are in conflict with both the Federal Power Act and prior holdings of this Court.

A. Under Section 201(b) of the Federal Power Act, FPC jurisdiction over wholesale sales is initially limited to those wholesale sales which are made "in interstate commerce." Section 201(c) goes on to explain that for the

purpose of the Act, electric energy shall be held to be transmitted in interstate commerce when transmitted from a State and consumed at a point outside thereof.

In its most recent opinion concerning FPC jurisdiction, this Court said:

> "We said in *Connecticut Co.* v. *Federal Power Comm'n.*, 324 U. S. 515, 529, 'Federal jurisdiction was to follow the flow of electric energy, an engineering and scientific, rather than a legalistic or governmental test.' And that is the test we have followed under both the Federal Power Act and the Natural Gas Act. * * *" *California* v. *Lo-Vaca Gathering Co.*, 379 U. S. 366, 369 (1965)

Similarly, see *FPC* v. *Southern California Edison Co.*, 376 U. S. 205, 209 n. 5 (1964).

The determinative basis of jurisdiction applied by the Commission, on the other hand, did not even purport to follow "the flow of electric energy".

> "* * * where a public utility participates in and is dependent upon an integrated interstate power pool, all of its wholesale sales for resale are subject to the jurisdiction of this Commission." (R. 16538)

Similarly, two judges of the Court below approved that basis (p. 7a, *infra*) and explicitly "reject[ed] I & M's fundamental proposition in this case that in order to prevail, the Federal Power Commission must * * * prove * * * that out-of-state energy reaches the wholesale customers" (p. 8a, *infra*).

This departure from and rejection of "the test [this Court has] followed under both the Federal Power Act

and the Natural Gas Act" merits careful review by this Court, particularly in view of the significance of this case for future jurisdictional proceedings.*

The intimation of the Court below that this test was met with respect to Petitioner's Indiana sales (p. 6a, *infra*) is not supported by substantial evidence. Briefly, any such determination from the record herein must rest either upon (1) the characteristics of interconnected elec-

* The significance of this case was recognized during the hearings, when the presiding Examiner characterized the case as "of great importance, not only to the Commission, but to the entire industry" (R. 2212); subsequently, it has been noted that "It is evident that the Commission has adopted, in *I & M* and subsequent decisions [predicated thereon], a rationale for asserting jurisdiction which is at variance with both its former practice and the test presently approved by the Supreme Court." NOTE, Electric Utility Jurisdiction of the Federal Power Commission, 40 N. Y. U. L. Rev. 1129, 1153 (1965).

FPC has already made clear that it intends to rely upon this case in the future to assert jurisdiction over virtually all wholesale sales, by employing it to claim jurisdiction over all wholesale sales by electric utilities interconnected directly or indirectly with electric utilities in other states. It relied upon the rule first expressed in this case to assert jurisdiction over wholesale sales of three other utilities within a year of its decision in the present case. *Arkansas Power & Light Company*, 60 P. U. R. 3d 1 (1965); *Public Service Co. of Indiana*, 62 P. U. R. 3d 65 (1965); *Cincinnati Gas & Electric Co.*, 62 P. U. R. 3d 179 (1966).

The test announced in this case will be employed by FPC in all foreseeably subsequent jurisdictional proceedings, because virtually all that is required in the way of proof is a showing that the customer in question is connected, directly or otherwise, to an out-of-state source of electric energy. The effect of this new test is to repudiate the words of this Court in *Jersey Central Power & Light Co.* v. *FPC*, 319 U. S. 61, 72 (1943) that "Mere connection determines nothing." Indeed, in *Arkansas Power & Light*, FPC took the position that "a purely negative showing of the absence of measurable interstate flow" of electric energy to a sale, based upon the method accepted by this Court as substantial scientific and engineering proof of jurisdiction in *FPC* v. *Southern California Edison*, would not defeat jurisdiction, "no matter how comprehensive". 60 P. U. R. 3d at 6.

tric system operation dealt with at length by the Commission and the Court below, or (2) a method of analysis of possible electric energy flows described as commingling. As to (1), the Commission conceded in its brief to the Court of Appeals (p. 32) that such characteristics were not relied upon or put into evidence to show that out-of-state energy reached the individual customers. As to (2), the witness sponsoring the presentation admitted that the data upon which it is predicated "do not even suggest or tell what happened during the hour for which the data were used" (R. 1785) and that the analysis itself "does not consider what may be the actual arrangement or the actual movement of the energy within the circuits" of an electrical system (R. 1829).

B. Section 201(b) of the Federal Power Act also provides that "The [Federal Power] Commission * * * shall not have jurisdiction * * * over facilities used in local distribution." This Court has twice made it clear that in its view this prohibition exempts from FPC jurisdiction sales made over facilities used in local distribution. (1) In *FPC* v. *Southern California Edison Co., supra,* it said:

> "We hold that §201(b) grants the FPC jurisdiction of all sales of electric energy at wholesale in interstate commerce *not expressly exempted* by the Act itself,[6] * * *
>
> [6]Section 201(b) expressly *excludes* FPC jurisdiction 'over facilities used in local distribution.' * * * Whether facilities are used in local distribution—although *a limitation on FPC jurisdiction* and a legal standard that must be given effect in addition to the technological transmission test [citing *Connecticut Light & Power, supra*]—involves a question of fact to be decided by the FPC as an original matter." 376 U. S. at 210 (Emphasis added)

(2) In *California* v. *Lo-Vaca Gathering Co., supra,* this Court relied upon *Connecticut Light & Power, supra,* for

the proposition that "Federal jurisdiction was to follow the flow of electric energy. * * *" The Court continued: "And that is the test we have followed under both the Federal Power Act and the Natural Gas Act, except as Congress itself has substituted a so-called legal standard for the technological one. *Id.*, at 530-531." The cited pages in *Connecticut Light & Power* discuss the local distribution exemption.

FPC's holding that "nothing in the Power Act * * * makes [Federal Power] Commission jurisdiction over sales dependent on whether the facilities used are local distribution facilities" (R. 16548) is directly contrary to both the statute and the two most recent opinions of this Court, as is the holding of the Court below that "The exemption for local distribution facilities applies to a company's status as a public utility and not as to the Commission's jurisdiction over sales in interstate commerce for resale" (p. 8a, *infra*). These departures from the statute and prior opinions of this Court also merit careful review.

Conclusion

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

RICHARD M. DICKE
ROLON W. REED
ANTHONY L. FLETCHER
Attorneys for Petitioner
120 Broadway
New York, New York 10005

SIMPSON THACHER & BARTLETT,
Of Counsel

Appendix A

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 15285 SEPTEMBER TERM 1965—APRIL SESSION 1966

INDIANA & MICHIGAN ELECTRIC COMPANY, *Petitioner*,
v.
FEDERAL POWER COMMISSION, *Respondent*.

On Petition for Review of Final Orders of the Federal Power Commission

JULY 13, 1966

Before DUFFY, KNOCH and KILEY, *Circuit Judges*.

DUFFY, *Circuit Judge*. The orders of the Federal Power Commission here under review (Opinion No. 458) issued April 14, 1965 and Opinion No. 458-A issued June 11, 1965, 33 FPC .....), require the Indiana & Michigan Electric Company (I&M) to file with the Commission its rate schedules covering wholesale sales to fourteen municipal electric systems and seven rural electric cooperative systems located in Indiana, and two municipal electric systems and one rural electric cooperative system located in Michigan, all of which sales were found by the Commission to be in interstate commerce.

Petitioner appeals from the above orders claiming there is no basis in law or in fact for the finding below that the Federal Power Commission has jurisdiction over the sales here in issue. The Federal Power Commission has juris-

diction over the wholesale sale of electric energy only if the sale is in interstate commerce. 16 U.S.C. §824. Petitioner also claims it did not receive a fair hearing in accordance with due process of law.

Indiana & Michigan Electric Company, together with five other operating companies, is an integral part of the American Electric Power System (AEP), a single coordinated power system operating as an integrated unit in Michigan, Indiana, Ohio, Kentucky, West Virginia, Virginia and Tennessee, with generating facilities combined by an inter-connected transmission grid. The System's dispatching center at Canton, Ohio, directs the dispatch and utilization of energy on a continuous basis to provide the capacity and energy required to carry all the customer demands in the seven-state area at maximum economy.

The proof shows that I&M realizes substantial advantages from its participation in the integrated operations including savings in capital outlay for generating facilities, savings in the cost of generating and transmitting energy, better control and maintenance of voltage levels and greater reliability of service.

The System serves more than 5,400,000 people, and is tied together by a network of 14,000 circuit miles of 345,000 volt line, the highest voltage in general use in the United States. The System is interconnected with nineteen other electric power systems at sixty-six locations, including thirty-nine major, high-voltage interconnections.

The electric load of every customer of every operating company in the System is supplied with electric energy from the entire AEP pool.

AEP makes no attempt to control energy flows on individual lines because electric energy flows freely and auto-

matically as determined by the electric characteristics of the network and operations of the System. Only the net of flows over all interconnections is controlled by increasing or decreasing generation so as to maintain interconnection schedules and to maintain frequencies at 60 cycles.

I&M daily transmits electric energy across the Indiana-Michigan border. The proof showed that I&M's total annual generation in Michigan is insufficient to supply the annual demand of its Michigan wholesale customers, and the additional amounts of energy needed are provided by I&M from sources outside the state of Michigan.

The Commission found that the evidence in the record clearly showed the receipt of out-of-state energy by I&M's wholesale customers. The Commission said: "Moreover, while it is not practicable to trace the energy flows precisely from specific generating plants to specific loads, the company records show conclusively that energy generated outside Indiana and Michigan pervades I&M's facilities and is delivered to those portions of I&M's system serving the municipals and cooperatives, and we so find. Thus, I&M receives electric energy from Ohio Power Company, The Cincinnati Gas and Electric Company, Commonwealth Edison Company, Ohio Valley Electric Corporation, and probably, Illinois Power Company, all of whose generation is located outside of Indiana or Michigan, and transmits this energy on its high voltage transmission network. For instance, the energy from Commonwealth Edison is received at I&M's Olive Substation in northern Indiana, and, when the I&M generating units at the Twin Branch station are not operating, commingled energy through Olive supplies practically all of the electric needs of north central Indiana and Michigan area. . . ."

Appendix A

Petitioner insists that Federal Power Commission sales jurisdiction must be proved by substantial scientific and engineering evidence that out-of-state energy flows to each sale in issue and that these sales are not made over facilities used in local distribution. I&M insists that the AEP system is too complex to permit ascertainment that out-of-state energy did or did not reach I&M's wholesale customers.

I&M contends that the most that can be said for the evidence produced by the Federal Power Commission in this case is that there does exist a hypothetical possibility that any particular load of an electric system connected to an interstate system could, in fact, be receiving energy at any given moment solely from an in-state source; solely from an out-of-state source; or from a combination of both.

Electric energy moves at approximately 186,000 miles per second—the speed of light. It cannot be stored and is generated as needed. The loads which are usually supplied by various generating sources on a network, change from moment to moment, being added to, increased, decreased, or cut off at the discretion of the customer. Every change affects every other generating unit connected with the network because they are interlocked electromagnetically.

The amount of system generation is constantly changing and system frequency, which is an indication of the speed of the generators, also fluctuates continually; usually a bit above or a bit below 60 cycles.

Every connected generator in AEP's seven-state system, contributes energy to the system in order to supply part of the increment of an additional load and to main-

tain the balance in the system between generation and load.

American Electrical Power Service Corporation (AEP), pursuant to a contract between itself and the operating subsidiaries, renders centralized management, engineering and supervisory service, and operates the dispatching center so that the minute-to-minute energy requirements of the system are met by those generating facilities that can be operated most economically at the time of need.

With few exceptions, all of the electrical energy produced by the generating units in the System is delivered to the high voltage lines of the common seven-state transmission grid from which all of the customers of the companies in the pool are supplied.

Although I&M has generating capacity more than sufficient to meet the energy needs of its Indiana and Michigan customers, it frequently generates insufficient energy to meet its own requirements. For example, during 1962, I&M's Twin Branch generating station, with 29% of I&M's steam electric capacity, generated only 7% of I&M's steam electric production. Because of its relatively high fuel costs, the Twin Branch station was shut down for 107 full days in 1962, and for some hours of each of 164 other days in that year.

Consequently, many of the interconnection transactions with non-affiliated companies are transactions in which the energy sold is generated at a cost lower than it would cost the buyer to generate it. To illustrate, the low-cost energy from Appalachian Power Company and Ohio Power Company is used by I&M in place of energy which could have been generated at a higher cost at its Twin Branch plants.

It is impossible to match generating instantly to the load variations and frequency deviations that are con-

stantly occurring, but the System keeps these deviations as small as possible by tie-line and frequency control equipment. As a result, says the Commission, each day of the year there are transfers of electric energy into and out of I&M's electric system across the Indiana-Ohio and Indiana-Illinois borders.

We must first consider here 1) whether the electric energy sold by I&M, a member of an integrated seven-state electric power system that meets its system loads with power generated in various states on the basis of economy, are sales in interstate commerce subject to the jurisdiction of the Federal Power Commission, and 2) whether the facilities used in making such sales are facilities used in local distribution, and if so, whether for that reason the sales are beyond the jurisdiction of the Commission.

The first sentence of I&M's brief emphasizes that for more than forty years, the regulation of plaintiff's sales of electric energy has been by the state of Indiana. Although Indiana has exercised jurisdiction over I&M's sales up until the present, it has been held that "a history of previously unchallenged regulation by the State does not oust the Commission of jurisdiction." *State of Wisconsin* v. *Federal Power Commission,* D.C. Circuit, 201 F.2d 183, 185, cert. den. 345 U.S. 934.

We think the proof before the Commission was sufficient to show that out-of-state energy reached all of the wholesale customers. True, point to point tracing was impossible. This kind of tracing requires automatic recording meters at various points on the system and I&M does not need and does not have such meters. Hence, I&M insists that this kind of proof is not possible on their system, and that no other kind or type of proof can be sufficient.

Appendix A

We think the Commission was justified in holding that the important consideration in determining jurisdiction here is the integrated interstate pool character of the operation. There is no dispute in the evidence but that in the AEP electric system, of which I&M is a part, a pool of energy generated in several states supplies the entire system load, without reference to state or corporate lines.

The unpredictable and free-flow of energy in the System in response to any number of constantly changing occurrences, makes it certain, in the view of the Federal Power Commission that out-of-state energy received by I&M at a number of points at or near its eastern, southern or western borders, at one time or another, reaches each of I&M's wholesale customers.

We hold the Commission was justified, based upon expert opinion evidence and otherwise, in holding the sales by I&M to its wholesale customers were in interstate commerce and were subject to the jurisdiction of the Federal Power Commission. *Pennsylvania Water & Power Co.* v. *Federal Power Commission*, 343 U.S. 414.

In the *Pennsylvania Water* case, the Supreme Court, in referring to the integrated interstate electric system involved, quoted approvingly from the Commission's opinion below which had stated:

> "In this manner energy crossing the State boundary, with other system energy, is used to fulfill system requirements. There result times when system energy generated in Pennsylvania is used, mixed or unmixed, in meeting system requirements in Maryland. Similarly, there are occasions when system energy from Maryland is used, mixed or unmixed, in meeting system requirements in Pennsylvania. Ener-

gy flows in, across, and out of the system transmission network as the needs of the interconnected members develop from minute to minute and day to day.

"It is accordingly evident that the operations of the unified system enterprise are completely interstate in character, notwithstanding the fact that system energy transactions at some particular times may involve energy never crossing the State boundary."

We reject I&M's fundamental proposition in this case that in order to prevail, the Federal Power Commission must do what I&M claims to be impossible, that is, to prove by either tracing or some other unnamed "scientific and engineering proof" that out-of-state energy reaches the wholesale customers. We might recall that even in criminal cases, guilt beyond a reasonable doubt often can be established by circumstantial evidence.

We also reject I&M's argument that the facilities used to deliver electric energy to I&M's wholesale customers are "facilities used in local distribution" and that therefore I&M's sales are exempt from Commission jurisdiction under 16 U.S.C. §864(b) which provides: ". . . The Commission . . . shall not have jurisdiction . . . over facilities . . . used in local distribution or only for the transmission of electric energy in intrastate commerce. . . ." The exemption for local distribution facilities applies to a company's status as a public utility and not as to the Commission's jurisdiction over sales in interstate commerce for resale. *Wisconsin and Michigan Power Co.* v. *Federal Power Commission*, 7 Cir., 197 F.2d 472, 477.

We now consider the claim of I&M that the Commission did not afford it a fair hearing.

Appendix A

On July 16, 1963, I&M filed applications for *subpoenas duces tecum* and *ad testificandum* to take the depositions of the Chairman, Secretary and a staff member of the Power Commission. These applications were denied on the basis that under the circumstances present, Commission members were not subject to examination; that data requested was in the public files and was available to I&M, and that the subpoena was a blanket request for data of appropriate persons, studies and analyses which were the bases underlying the issues of the order to show cause which initiated this proceeding. Particular documents were not identified or specified.

On August 30, 1963, I&M sued in the District Court for the Northern District of Indiana, for mandamus and for an injunction to stay proceedings and compel the granting of discovery. The complaint was dismissed for want of jurisdiction. *Indiana & Michigan Electric Co.* v. *Federal Power Commission*, 224 F. Supp. 166. The appeal from that order was dismissed.

We hold that the procedural objections of I&M are without merit, and that the various rulings of the Commission objected to by I&M did not result in that Company being denied a fair hearing.

The orders of the Federal Power Commission here in issue are

AFFIRMED

KNOCH, *Circuit Judge.* (dissenting) I must respectfully dissent from the majority. It seems to me that we must find some substantial scientific or engineering evidence that the out-of-state energy did in fact flow to the Indiana sales in issue; that the circumstantial evidence on which the Commission and the majority rely is insufficient to

justify taking the regulation of the Indiana sales in question out of the hands of the long-established state authority. I am also inclined to agree with Judge Eschbach (*Indinana & Michigan Electric Co.* v. *Federal Power Commission*, D.C., N.D., Indiana, 1963, 224 F. Supp. 166, 170) "that the record in the instant case constitutes an alarming example of how a private litigant before an administrative agency may be denied the opportunity to pursue the orderely procedures so vital to our traditional notions of fair play."

I would reverse the order of the Commission and remand the case with instructions to enter a dismissal for want of jurisdiction.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

Appendix B

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

Wednesday, July 13, 1966

Before

Hon. F. Ryan Duffy, Circuit Judge
Hon. Win G. Knoch, Circuit Judge
Hon. Roger J. Kiley, Circuit Judge

INDIANA & MICHIGAN ELECTRIC COMPANY,
Petitioner,

No. 15285 vs.

FEDERAL POWER COMMISSION,
Respondent.

Petition for review of orders of the Federal Power Commission.

This cause came on to be heard on the petition for review of orders of the Federal Power Commission and the record from the Federal Power Commission, and was argued by counsel.

On consideration whereof, it is ordered by this Court that the orders of the Federal Power Commission entered in this cause on April 14, 1965, and June 11, 1965, be, and the same are hereby AFFIRMED, in accordance with the opinion of this Court filed this day; and upon presentation, an appropriate decree will be entered.

Appendix C

Section 201 of the Federal Power Act, 16 U. S. C. §824, 49 Stat. 847

DECLARATION OF POLICY—APPLICATION OF PART—DEFINITIONS

Sec. 201. (a) It is hereby declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this Part and the Part next following and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.

(b) The provisions of this Part shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this Part and the Part next following, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter.

(c) For the purpose of this Part, electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof;

but only insofar as such transmission takes place within the United States.

(d) The term "sale of electric energy at wholesale" when used in this Part means a sale of electric energy to any person for resale.

(e) The term "public utility" when used in this Part or in the Part next following means any person who owns or operates facilities subject to the jurisdiction of the Commission under this Part.

(f) No provision in this Part shall apply to, or be deemed to include, the United States, a State or any political subdivision of a State, or any agency, authority or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned, directly or indirectly, by any one or more of the foregoing, or any officer, agent, or employee of any of the foregoing acting as such in the course of his official duty, unless such provision makes specific reference thereto.

Section 205 of the Federal Power Act, 16 U. S. C. §824d, 49 Stat. 851

RATES AND CHARGES—SCHEDULES—SUSPENSION OF NEW RATES

Sec. 205. (a) All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission,

(1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, services, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any public utility in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint or upon its own initiative without complaint, at once, and, if it so

orders, without answer or formal pleading by the public utility, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the public utility affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of such five months, the proposed change of rate, charge, classification, or service shall go into effect at the end of such period, but in case of a proposed increased rate or charge, the Commission may by order require the interested public utility or public utilities to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require such public utility or public utilities to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public utility, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

Appendix C

Section 206 of the Federal Power Act, 16 U. S. C. §824e, 49 Stat. 852

POWER OF COMMISSION TO FIX RATES AND CHARGES—DETERMINATION OF COST OF PRODUCTION OR TRANSMISSION

Sec. 206. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order.

(b) The Commission upon its own motion, or upon the request of any State commission whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transmission of electric energy by means of facilities under the jurisdiction of the Commission in cases where the Commission has no authority to establish a rate governing the sale of such energy.

Section 307 of the Federal Power Act, 16 U. S. C. §825f, 49 Stat. 856

INVESTIGATIONS BY COMMISSION—ATTENDANCE OF WITNESSES—DEPOSITIONS—IMMUNITY OF WITNESSES

Sec. 307. (a) The Commission may investigate any facts, conditions, practices, or matters which it may find necessary or proper in order to determine whether any

person has violated or is about to violate any provision of this Act or any rule, regulation, or order thereunder, or to aid in the enforcement of the provisions of this Act or in prescribing rules or regulations thereunder, or in obtaining information to serve as a basis for recommending further legislation concerning the matters to which this Act relates. The Commission may permit any person to file with it a statement in writing under oath or otherwise, as it shall determine, as to any or all facts and circumstances concerning a matter which may be the subject of investigation. The Commission, in its discretion, may publish or make available to State commissions information concerning any such subject.

(b) For the purpose of any investigation or any other proceeding under this Act, any member of the Commission, or any officer designated by it, is empowered to administer oaths and affirmations, subpena witnesses, compel their attendance, take evidence, and require the production of any books, papers, correspondence, memoranda, contracts, agreements, or other records which the Commission finds relevant or material to the inquiry. Such attendance of witnesses and the production of any such records may be required from any place in the United States at any designated place of hearing. Witnesses summoned by the Commission to appear before it shall be paid the same fees and mileage that are paid witnesses in the courts of the United States.

(c) In case of contumacy by, or refusal to obey a subpena issued to, any person, the Commission may invoke the aid of any court of the United States within the jurisdiction of which such investigation or proceeding is carried on, or where such person resides or carries on business, in requiring the attendance and testimony of witnesses and the production of books, papers, correspondence, memo-

randa, contracts, agreements, and other records. Such court may issue an order requiring such person to appear before the Commission or member or officer designated by the Commission, there to produce records, if so ordered, or to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof. All process in any such case may be served in the judicial district whereof such person is an inhabitant or wherever he may be found or may be doing business. Any person who willfully shall fail or refuse to attend and testify or to answer any lawful inquiry or to produce books, papers, correspondence, memoranda, contracts, agreements, or other records, if in his or its power so to do, in obedience to the subpena of the Commission, shall be guilty of a misdemeanor and, upon conviction, shall be subject to a fine or not more than $1,000 or to imprisonment for a term of not more than one year, or both.

(d) The testimony of any witness may be taken, at the instance of a party, in any proceeding or investigation pending before the Commission, by deposition, at any time after the proceeding is at issue. The Commission may also order testimony to be taken by deposition in any proceeding or investigation pending before it, at any stage of such proceeding or investigation. Such depositions may be taken before any person authorized to administer oaths not being of counsel or attorney to either of the parties, nor interested in the proceeding or investigation. Reasonable notice must first be given in writing by the party or his attorney proposing to take such deposition to the opposite party or his attorney of record, as either may be nearest, which notice shall state the name of the witness and the time and place of the taking of his deposition. Any person may be compelled to appear and depose, and to produce

documentary evidence, in the same manner as witnesses may be compelled to appear and testify and produce documentary evidence before the Commission, as hereinbefore provided. Such testimony shall be reduced to writing by the person taking the deposition, or under his direction, and shall, after it has been reduced to writing, be subscribed by the deponent.

(e) If a witness whose testimony may be desired to be taken by deposition be in a foreign country, the deposition may be taken before an officer or person designated by the Commission, or agreed upon by the parties by stipulation in writing to be filed with the Commission. All depositions must be promptly filed with the Commission.

(f) Witnesses whose depositions are taken as authorized in this Act, and the person or officer taking the same, shall be entitled to the same fees as are paid for like services in the courts of the United States.

(g) No person shall be excused from attending and testifying or from producing books, papers, correspondence, memoranda, contracts, agreements, or other records and documents before the Commission, or in obedience to the subpena of the Commission or any member thereof or any officer designated by it, or in any cause or proceeding instituted by the Commission, on the ground that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he is compelled to testify or produce evidence, documentary or otherwise, after having claimed his privilege against self-incrimination, except that such individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying.

Appendix C

Section 308 of the Federal Power Act, 16 U. S. C. §825g, 49 Stat. 858

HEARINGS—RULES OF PROCEDURE

Sec. 308. (a) Hearings under this Act may be held before the Commission, any member or members thereof or any representative of the Commission designated by it, and appropriate records thereof shall be kept. In any proceeding before it, the Commission, in accordance with such rules and regulations as it may prescribe, may admit as a party any interested State, State commission, municipality, or any representative of interested consumers, or security holders, or any competitor of a party to such proceeding, or any other person whose participation in the proceeding may be in the public interest.

(b) All hearings, investigations, and proceedings under this Act shall be governed by rules of practice and procedure to be adopted by the Commission, and in the conduct thereof the technical rules of evidence need not be applied. No informality in any hearing, investigation, or proceeding or in the manner of taking testimony shall invalidate any order, decision, rule, or regulation issued under the authority of this Act.

Appendix C

Section 313(b) of the Federal Power Act, 16 U. S. C. §825*l*(b), 49 Stat. 860 as Amended 62 Stat. 991, 63 Stat. 107, 72 Stat. 947

REHEARINGS: COURT REVIEW OF ORDERS

Sec. 313

* * *

(b) Any party to a proceeding under this Act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the Circuit Court of Appeals of the United States for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of

the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

Section 12 of the Administrative Procedure Act, 5 U. S. C. A. §1011, 60 Stat. 244

Sec. 12. Nothing in this Act shall be held to diminish the constitutional rights of any person or to limit or repeal additional requirements imposed by statute or otherwise recognized by law. Except as otherwise required by law, all requirements or privileges relating to evidence or procedure shall apply equally to agencies and persons. If any provision of this Act or the application thereof is held invalid, the remainder of this Act or other applications of such provision shall not be affected. Every agency is granted all authority necessary to comply with the requirements of this Act through the issuance of rules or otherwise. No subsequent legislation shall be held to supersede

or modify the provisions of this Act except to the extent that such legislation shall do so expressly. This Act shall take effect three months after its approval except that sections 7 and 8 shall take effect six months after such approval, the requirement of the selection of examiners pursuant to section 11 shall not become effective until one year after such approval, and no procedural requirement shall be mandatory as to any agency proceeding initiated prior to the effective date of such requirement.

Rule 23(a) of the Federal Power Commission Regulations of Practice and Procedure, 18 C. F. R. §1.23(a), 12 F. R. 8479

Sec. 1.23. Subpenas.—(a) *Issuance.* Subpenas for the attendance of witnesses or for the production of documentary evidence, unless directed by the Commission upon its own motion, will issue only upon application in writing to the Commission or the presiding officer, except that during sessions of a hearing in a proceeding, such application may be made orally on the record before the Commission or presiding officer, who is hereby given authority to determine the relevancy and materiality of the evidence sought and to issue such subpenas in accordance with such determination. Such written applications shall be verified and shall specify as nearly as may be the general relevance, materiality, and scope of the testimony or documentary evidence sought, including, as to documentary evidence, specification as nearly as may be, of the documents desired and the facts to be proved by them in sufficient detail to indicate the materiality and relevance of such documents.

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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 646

INDIANA & MICHIGAN ELECTRIC COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, 1a–10a) is reported at 365 F. 2d 180. The opinion of the Federal Power Commission (R. 16538–16552; J.A. 721–743) is reported at 33 F.P.C. 739.

JURISDICTION

The judgment of the court of appeals was entered on July 13, 1966 (Pet. App. B, 11a). The petition for a writ of certiorari was filed on October 10, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 313(b) of the Federal Power Act, as amended, 16 U.S.C. 825*l*(b).

QUESTIONS PRESENTED

1. Whether petitioner's wholesale sales are subject to the jurisdiction of the Federal Power Commission.

2. Whether petitioner was denied a fair hearing.

STATUTES AND REGULATIONS INVOLVED

In addition to the statutes and regulations set out in Pet. App. C, 12a–23a, we have set forth in the Appendix, *infra*, pp. 11–13, Sections 301 and 304 of the Federal Power Act, 16 U.S.C. 825 and 825c, and Section 6(c) of the Administrative Procedure Act, 5 U.S.C. 1005(c).

STATEMENT

1. It is conceded that petitioner is a public utility within the meaning of Sections 201 (b) and (e) of the Federal Power Act (Pet. App. A, 12a–13a)—that is, that it owns or operates facilities for the transmission, or for the sale at wholesale, of electric energy in interstate commerce (R. 73, 1079–1082; Pet. 5–6). It is also conceded that petitioner receives out-of-State electric energy every day in the States of Indiana and Michigan (R. 905), and that some of its sales in issue in this case are sales of interstate energy[1] (R. 1088–1089; Pet. App. A, 3a). Petitioner contends, however, that the Commission failed to prove that its Indiana sales are in interstate commerce and hence within the Federal Power Commission's jurisdiction (Pet. 13; Pet. App. A, 4a). See Section 201(b) of the Federal Power Act, 16 U.S.C. 824(b). On this the record shows the following:

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[1] These are the sales to the Cities of Niles and Sturgis and to Fruit Belt Cooperative, all in Michigan.

Petitioner and five other interconnected operating companies are wholly owned subsidiaries of the American Electric Power Company, Inc. They comprise the American Electric Power System (AEP), operating as an integrated unit in seven States[2] (R. 899–901). AEP is also interconnected with a large number of other systems, all operated "in parallel"—that is, at a synchronized frequency of 60 cycles per second (R. 1035, 2839–2849). The AEP system is tied together by a network of 14,000 circuit miles of transmission line (R. 914), the total load (demand) of petitioner and the other members of the system being supplied by an interstate pool consisting both of energy generated by the AEP facilities in the seven States and energy from outside the system (R. 906–913). The AEP dispatching office assures that the entire seven-State load is supplied from generation facilities—regardless of their location or the location of the component parts of the load—selected on the basis of their ability to generate and deliver the needed energy at the lowest cost to the system (R. 906–913, R. 932–933). There is thus a constant lightning-fast flow of energy throughout the AEP system,[3] with no attempt being made to control the flows

[2] Michigan, Indiana, Ohio, Kentucky, West Virginia, Virginia and Tennessee.

[3] By reason of electromagnetic coupling, every operating generator tied into the interconnected systems loses frequency if the load on it exceeds the energy generated and gains frequency if the load is less than the generated energy (R. 946). The immediate reaction to a net increase in system load is that network energy rushes to the demand (R. 1882). This is because electric energy

on individual lines.[4]

The Commission's staff took the position that petitioner's wholesale sales were subject to Commission jurisdiction because, as just mentioned, they were supplied by a pool of interstate energy generated in the States within and without the system (R. 16159). The Commission so held (R. 16542–16545) and the court of appeals sustained its holding (Pet. App. A, 7a–8a). The staff also, however, put into the record studies showing the flow of out-of-State energy into Michigan and Indiana and to each of the customers in issue (R. 1082–1093). The Commission explained that the operation of a modern interconnected electric system made "tracing" of the kind urged by petitioner an unsatisfactory method of determining federal jurisdiction,[5] but nevertheless expressly found, on the

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travels at the speed of light, about 186,000 miles per second (R. 1075), so that the inrush of energy from elsewhere in the system occurs before generation can be increased to equal the increased load (R. 1076–1077).

[4] R. 937, 1700–1704. Only the net of all the flows (as distinguished from the total inflows and outflows) between AEP and other systems is controlled by increasing or decreasing AEP generation so as to maintain net import or export schedules and to maintain frequency at 60 cycles (*ibid.*).

[5] The Commission stated (R. 16545):

> * * * The manner in which this pool is operated is such that exact tracing of energy flows would require the installation of expensive meters and the expenditure of an excessive amount of time. Even if it could be done practically, a slight change in line design or operating technique would lead to a claim that jurisdiction needed to be demonstrated all over again. Thus in a very real sense tracing does not necessarily reflect the physical realities of the movement of electric energy, but is rather based on an analogy to the flow of liquids. Of course, there may still be some power systems in which the flows are simple enough to be susceptible of the tracing analogy. The

basis of the staff's flow studies, that out-of-State energy was in fact received by all of petitioner's wholesale customers (R. 16546).

2. The Commission further held that the exemption in Section 201(b) of the Federal Power Act of facilities used in local distribution did not preclude its exercise of jurisdiction over the sales in interstate commerce for resale—first, because facilities not used in local distribution were involved, and second, because in any event the exemption does not apply to sales otherwise within the Commission's jurisdiction (R. 16548). The court of appeals affirmed this ruling on the Commission's second ground (Pet. App. A, 8a).

3. Petitioner was "in possession of much of the factual data required by [the] Commission's Staff to analyze the jurisdictional problems in this case" and the staff was afforded access to voluminous data (Pet. 8). Petitioner in turn sought subpoenas for the appearance, among others, of Commission members (R. 15705), and for the production of "[a]ll, and all copies of, letters, telegrams, communications, memoranda, memoranda of conversations and of telephone conversations, studies, surveys, analyses, transcripts of testimony, file data and other documents, books and writings in the possession or control of such person relating to" ten subjects (R. 15698–15700) which the Commission summed up as "'the bases, criteria, expert opinion, studies and analyses', underlying the issuance of the Order to Show Cause initiating this

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showing of the inherently interstate pool operations made in this record better describes physical and engineering realities than the somewhat artificial assumptions used in tracing.

proceeding" (R. 14). Noting that Commission members may not be examined, and that "[d]ata in the public files and records of the Commission are now and have been available" to petitioner (R. 14–15), the Commission denied the application. It further stated: "Particular documents are not requested, identified or specified. It is claimed that the requested data are necessary to prepare for hearing. But the relevancy or materiality of such material to the facts upon which the issue of Commission jurisdiction must be determined is not demonstrated" (R. 14). The court of appeals held that petitioner had not been denied a fair hearing (Pet. App. A, 9a).

ARGUMENT

The principal issue here involves a determination by the Federal Power Commission that wholesale sales of electric energy by a member of an integrated interstate power pool are in interstate commerce and consequently subject to the Commission's jurisdiction. The Commission's determination was fully in accord with principles uniformly applied by this Court and by the courts of appeals, and has now been sustained in two circuits,[6] with no conflict. The subsidiary contention that the sales are nonetheless exempt from Commission jurisdiction because they may involve local distribution facilities has been consistently rejected. Finally, petitioner's procedural point is without merit. The Commission needed and was given

[6] Besides the instant case, see *Arkansas Power & Light Co.* v. *Federal Power Commission*, C.A. 8, Docket No. 18,262, decided Nov. 7, 1966. We have printed a copy of the Eighth Circuit's opinion in Appendix B, *infra*, pp. 14–29.

access to petitioner's records to secure necessary information as to petitioner's operations. But this does not support a claim that petitioner was prejudiced by the Commission's refusal to make available to it a mass of internal staff memoranda which petitioner requested in order to demonstrate differences of staff opinion.

In sum, the court of appeals' decision affirming the Commission was clearly correct, and further review is not warranted.

1. In *Pennsylvania Water & Power Co.* v. *Federal Power Commission,* 343 U.S. 414, 420, this Court expressly held that where a pool of energy generated in several States supplies the entire system load, "the operations of the unified system enterprise are completely interstate in character, notwithstanding the fact that system energy transactions at some particular times may involve energy never crossing the State boundary." See, also, *United States* v. *Public Utilities Commission of California,* 345 U.S. 295, 316–317; *Wisconsin-Michigan Power Co.* v. *Federal Power Commission,* 197 F. 2d 472, 474 (C.A. 7), certiorari denied, 345 U.S. 934; *Wisconsin* v. *Federal Power Commission,* 201 F. 2d 183 (C.A.D.C.), certiorari denied, 345 U.S. 934. To be sure, the complexity of petitioner's interstate system, combined with the absence of metering devices, rendered impractical the point-to-point "tracing" utilized by the Commission in some earlier cases to demonstrate the presence of interstate energy. However, the evidence (see Statement *supra,* pp. 3–4) showing the method of operation of petitioner's system—which involves the

supply of the entire system's load from an interstate pool of energy—amply warranted the Commission's conclusion that petitioner's wholesale sales are in interstate commerce.

2. Neither the Commission nor the court below was breaking new ground in rejecting petitioner's contention that the Commission's assertion of jurisdiction of interstate sales was precluded by the provision of Section 201(b) of the Power Act exempting facilities used in local distribution. The contention plainly carries too far; if it were accepted, the regulatory authority of the Commission over electric power companies would be severely curtailed, since many of their facilities are used for retail as well as wholesale sales of interstate energy. Actually, the purpose of the provision is only to exempt from the status of a "public utility" under the Act companies engaged *solely* in local distribution of electric energy, and it is clear, therefore, that the provision does not remove any wholesale sales in interstate commerce from the Commission's jurisdiction. *Federal Power Commission* v. *Southern California Edison Co.*, 376 U.S. 205, 210, n. 6; see *United States* v. *Public Utilities Commission of California*, 345 U.S. 295, 316; *Wisconsin-Michigan Power Co.* v. *Federal Power Commission*, 197 F. 2d 472, 477 (C.A. 7), certiorari denied, 345 U.S. 934; *Wisconsin* v. *Federal Power Commission*, 201 F. 2d 183, 185 (C.A.D.C.), certiorari denied, 345 U.S. 934.[7]

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[7] *Connecticut Light & Power Co.* v. *Federal Power Commission*, 324 U.S. 515, is not in point. The company there made no wholesale sales in interstate commerce; the issue discussed (but not resolved) by this Court was whether the

3. Petitioner bases its claim that it was denied a fair hearing on the proposition that it was entitled to "equality of treatment" with the Commission's staff, and that since the staff was afforded access to petitioner's records, petitioner was entitled to access to the Commission's records. In the circumstances, the claim is manifestly without substance. Petitioner had in its possession the essential factual data about its operations without which the proceeding could not have been conducted (Pet. 8–10). Those data were produced to the staff. In return petitioner demanded vast quantities of documents whose relevance, to say the least, was highly questionable and never shown. Apart from documents freely available to petitioner because they were in the Commission's files,[8] petitioner principally sought internal Commission memoranda, relating to this and other proceedings, in the hope of ferreting out possible disagreements among Commission personnel (R. 15698–15700, 16169, n. 11, 16207–16208, 16549–16551). The Commission properly held that petitioner had failed to make an adequate showing of its need for, or entitlement to, such information (R. 16550–16551, Pet. App. A, 9a).

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company was a public utility subject to the Commission's accounting regulations—that is, whether *any* of its facilities were facilities for the transportation of electric energy in interstate commerce and not local distribution facilities.

[8] The Commission advised petitioner of the availability of data in the public files (R. 14–15).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

RICHARD A. SOLOMON,
General Counsel,

HOWARD E. WAHRENBROCK,
Solicitor,

DREXEL D. JOURNEY,
Assistant General Counsel,

ISRAEL CONVISSER,
Attorney,
Federal Power Commission.

NOVEMBER 1966.

APPENDIX A

The Federal Power Act, August 26, 1935, c. 687, 49 Stat. 838, 16 U.S.C. 791, *et seq.*, provides in pertinent part:

> SECTION 301. (a) Every licensee and public utility shall make, keep, and preserve for such periods, such accounts, records of cost-accounting procedures, correspondence, memoranda, papers, books, and other records as the Commission may by rules and regulations prescribe as necessary or appropriate for purposes of the administration of this Act, including accounts, records, and memoranda of the generation, transmission, distribution, delivery, or sale of electric energy, the furnishing of services or facilities in connection therewith, and receipts and expenditures with respect to any of the foregoing: *Provided, however,* That nothing in this Act shall relieve any public utility from keeping any accounts, memoranda, or records which such public utility may be required to keep by or under authority of the laws of any State. The Commission may prescribe a system of accounts to be kept by licensees and public utilities and may classify such licensees and public utilities and prescribe a system of accounts for each class. The Commission, after notice and opportunity for hearing, may determine by order the accounts in which particular outlays and receipts shall be entered, charged, or credited. The burden of proof to justify every accounting entry questioned by the Commission shall be on the person making, authorizing, or requiring such entry, and the Commission may suspend a charge or credit

pending submission of satisfactory proof in support thereof.

(b) The Commission shall at all times have access to and the right to inspect and examine all accounts, records, and memoranda of licensees and public utilities, and it shall be the duty of such licensees and public utilities to furnish to the Commission, within such reasonable time as the Commission may order, any information with respect thereto which the Commission may by order require, including copies of maps, contracts, reports of engineers, and other data, records, and papers, and to grant to all agents of the Commission free access to its property and its accounts, records, and memoranda when requested so to do. No member, officer, or employee of the Commission shall divulge any fact or information which may come to his knowledge during the course of examination of books or other accounts, as hereinbefore provided, except insofar as he may be directed by the Commission or by a court.

(c) The books, accounts, memoranda, and records of any person who controls, directly or indirectly, a licensee or public utility subject to the jurisdiction of the Commission, and of any other company controlled by such person, insofar, as they relate to transactions with or the business of such licensee or public utility, shall be subject to examination on the order of the commission.

SEC. 304. (a) Every licensee and every public utility shall file with the Commission such annual and other periodic or special reports as the Commission may by rules and regulations or order prescribe as necessary or appropriate to assist the Commission in the proper administration of this Act. The Commission may prescribe the manner and form in which such reports shall be made, and require from such persons specific answers to all questions upon which the Commission may need information. The Commission may require that such reports

shall include, among other things, full information as to assets and liabilities, capitalization, net investment, and reduction thereof, gross receipts, interest due and paid, depreciation, and other reserves, cost of project and other facilities, cost of maintenance and operation of the project and other facilities, cost of renewals and replacement of the project works and other facilities, depreciation, generation, transmission, distribution, delivery, use, and sale of electric energy. The Commission may require any such person to make adequate provision for currently determining such costs and other facts. Such reports shall be made under oath unless the Commission otherwise specifies.

(b) It shall be unlawful for any person willfully to hinder, delay, or obstruct the making, filing, or keeping of any information, document, report, memorandum, record, or account required to be made, filed, or kept under this Act or any rule, regulation, or order thereunder.

The Administrative Procedure Act, June 11, 1946, c. 324, 60 Stat. 237, 5 U.S.C. 1001 *et al.*, provides in pertinent part:

6(c) SUBPENAS.—Agency subpenas authorized by law shall be issued to any party upon request and, as may be required by rules of procedure, upon a statement or showing of general relevance and reasonable scope of the evidence sought. Upon contest the court shall sustain any such subpena or similar process or demand to the extent that it is found to be in accordance with law and, in any proceeding for enforcement, shall issue an order requiring the appearance of the witness or the production of the evidence or data within a reasonable time under penalty of punishment for contempt in case of contumacious failure to comply.

APPENDIX B

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 18,262

Arkansas Power & Light Company, Petitioner,
v.
Federal Power Commission, Respondent.

On Petition to Review Orders of the Federal Power Commission.

[November 7, 1966.]

Before VOGEL, Chief Judge, MATTHES, Circuit Judge and DUNCAN, District Judge.

MATTHES, Circuit Judge.

In this proceeding petitioner, Arkansas Power & Light Company, (hereinafter Arkansas) seeks to review orders of the Federal Power Commission determining that Arkansas' sales of electric energy for resale to its municipal and cooperative customers are sales in interstate commerce within the meaning of Sections 201, 205 and 206 of the Federal Power Act, 49 Stat. 847, 851, 852 (1935), 16

U.S.C. §§824, 824d, 824e (1960). The sales at issue in this jurisdictional proceeding represent sales to twenty-three purchasers at 108 separate delivery points.[1]

I.

Arkansas is one of four utility operating companies which form part of the Middle South System (Middle South) of electric utilities, an integrated, interconnected group of utilities having a network of more than 5,000 miles of high voltage transmission lines throughout the states of Arkansas, Mississippi and Louisiana.[2] In addition to an extensive network of transmission facilities, these companies generate the bulk of their own electric energy from eighteen steam and hydroelectric power plants within this three state area. Transmission and generation functions are so coordinated and integrated as to permit an instantaneous transfer of electrical power to any part of Middle South's transmission network. The Middle South System in turn is interconnected with other major power systems in the eastern part of the United States and forms part of a network known as the "Interconnected Systems Group." This combine of the Interconnected Systems Group with other interconnected power systems, known as CANUSE and PJM,[3] covers the entire eastern half of the United States and represents about 140 electric utilities, of which petitioner Arkansas is one.

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1 Petitioner—Arkansas is admittedly a "public utility" within the meaning of Section 201 (e), 49 Stat. 847 (1935), 16 U.S.C. 824 (e) (1960), of the Federal Power Act, and therefore the Commission will have exclusive regulatory jurisdiction over all of Arkansas' sales in interstate commerce.

2 The other operating subsidiaries of the Middle South System are Louisiana Power & Light Company, Mississippi Power & Light Company and New Orleans Public Service, Inc.

3 Canada-United States Eastern Connection and Penn-New Jersey-Maryland Interconnection.

Each of Middle South's subsidiaries operates its generators synchronously at a 60 cycle frequency, a function known as load frequency control. Frequency control is a critical requirement for the effective operation of interconnected utilities. The Middle South System, as well as other power systems in the "interconnected Systems Group," operates on a form of automatic control called "Tie Line Bias" which makes each system contribute its assistance in maintaining the standard 60-cycle frequency. If the generating frequency falls below 60-cycles per second, this would mean that the load or electrical consumption on a particular interconnected system has increased, or that generation has decreased. Conversely, if the frequency rises, electrical consumption has decreased in relation to generation. The Middle South System as part of its obligation must provide sufficient generating capacity to avoid imposing the burden of regulating frequency on other systems.

The combined service areas of the Middle South subsidiaries form what is known as a "control area."[4] The control operator has a choice in the selection of generators in this control area to meet area power requirements. His selection is based upon the necessity of fulfilling combined system requirements at the least possible cost. Ordinarily the control operator employs the generating sources in the Middle South System to supply its own requirements. However, where there is a shortage of generation in the Middle South System, electric energy from outside the control area automatically moves in to supply the deficiency, a process referred to as "pool assist."

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4 A "control area" may comprise a single utility, or a group of several utilities in an interconnected system. Each control area is expected to adjust its generation to follow the fluctuation of the load and do its share of system frequency control.

Moreover, various other factors such as fuel costs, transmission losses, and generator performance may make it economically feasible to draw desired energy from other systems rather than from Middle South's own generation facilities. When such is the case, the control operator arranges interchange transactions with another system. Even where no pool assist or interchange is necessary, electric energy may flow unscheduled over the boundary ties[5] of the Middle South System.

The following finding of the Commission summarizes its findings in regard to the delivery of interstate energy to the wholesale customers.

> "As a consequence of this method of operation, Respondent [Arkansas] receives and delivers energy across state boundaries pursuant to rate schedules on file with the Commission. In 1963 Respondent received 1,062,818,000 kwh of electric energy from Louisiana Power and Mississippi Power within the control area and from Oklahoma Gas & Electric Company and Empire District Electric Company outside the control area. In the same year total deliveries to those systems were 766,462,000 kwh.
>
> "The sales to the 23 customers involved in these proceedings are made from short lines extending from substations where the voltage is stepped down in most instances from 115 kv to 13.8 kv for delivery to each customer. Total deliveries to these customers amounted to 718,768,360 kwh in 1963. The sales to the 23 customers are made from energy available in Middle South's control area which extends over three states and from energy received from other systems outside the control area. As in Indiana & Michigan, supra, we are not dealing merely with a single flow of energy or multiple flows of energy but are dealing instead with an interstate pool of energy to which the

5 Boundary ties are tie lines that connect one control area to another and define the geographical extent of a particular area.

generators of the control area and other interconnected systems contribute power and from which all loads, and sometimes the loads of other systems, are supplied. * * *" 34 F.P.C. at ....

The basic question for our determination is whether the Commission's finding that all of the twenty-three wholesale purchasers received interstate energy is supported by substantial evidence. Arkansas readily concedes that "some of the 108 sales involve from time to time interstate energy." Indeed, the tracing studies conducted by Arkansas and introduced at the hearing before the Commission show that at least sixteen out of twenty-three resale customers received energy from outside Arkansas during one of the study periods. Thus, in brief, Arkansas' position is that absent evidence of a study by the Commission based on the manual or computer tracing technique (concededly not made), there is no factual basis to support the Commission's finding. The Commission with candor acknowledges "that in past cases tracing studies * * * were put in evidence to show that out-of-state energy was delivered to specified customers." The Commission asserts, however, that the teachings of the Supreme Court clearly establish that where, as here, there is an integrated, interstate pool operation, jurisdiction may be proved without resort to tracing studies. We agree with the Commission and affirm.

We are not prepared to say that detailed tracing studies are a sine qua non to the conferral of federal jurisdiction where there exists an integrated, interstate "pool assist" operation as in the present case.

While the Supreme Court has reiterated that "federal jurisdiction was to follow the flow of electric energy, an engineering and scientific, rather than a legalistic or gov-

ernmental test", we do not construe this language as requiring the employment of tracing studies in every instance. While this standard was applied in *Federal Power Commission* v. *Southern California Edison Co.*, (The *Colton* case) 376 U.S. 205 (1964), it seems clear that the Supreme Court there was not confronted with the highly integrated, interconnected pool operation that characterizes the Middle South System. In the *Colton* case, the issue centered on whether out-of-state energy was delivered by Southern California Edison Co. to a single customer, the City of Colton. Since no integrated operation was present in that case, the Commission by necessity had to resort to scientific studies to show that out-of-state energy reached the sales to the City of Colton. Similarly in *Connecticut Light & Power Co.* v. *Federal Power Commission*, 324 U.S. 515 (1945), the Connecticut Light & Power Co. attempted to disavow all affiliation with the Connecticut Valley Power Exchange, an interstate power pool and rearrange "its operations with intent to cut every connection and discontinue every facility whose continued operation would render it subject to the Federal Power Commission's control." The Commission then attempted to invoke its jurisdiction upon a single remaining facility of the company. In such an instance only scientific and engineering data could substantiate the Commission's determination of jurisdiction over one facility, which otherwise retained the appearance of a local and intrastate service.

Moreover, we feel that the limited tracing studies offered by Arkansas convincingly demonstrates the existence of extensive amounts of interstate energy in each of the sales to its twenty-three customers, proof of which Arkansas contends does not exist. It stands undisputed in the record that Petitioner's tracing studies, while encompassing only

four hours out of an annual total of 8,760 hours, showed that out-of-state energy reached at least sixteen (or perhaps nineteen based upon the government interpretation) customers of Arkansas. We agree with the Commission that it seems highly probable that during the remaining unchecked period of 8,756 hours, some interstate energy did in fact reach each of Petitioner's twenty-three wholesale customers. To hold otherwise, we feel would ignore the patent realities of Arkansas' integrated operations.

In *Connecticut Light & Power Co.* v. *Federal Power Commission, supra,* the crucial question was whether the company was a "public utility" by reason of its ownership of facilities which were not used in local distribution. As previously indicated, the company for some time prior to August 26, 1935[6] operated as a member of the Connecticut Valley Power Exchange, an interstate power pool which interchanged energy among certain systems in New York, Massachusetts and Connecticut. Just prior to the effective date of the Act and for the purpose of avoiding regulation by the Commission, the company severed all operations which it believed would render it subject to the Commission's jurisdiction. Pertinent here is the Court's observation that:

> "had such operation [interchange of energy from the power pool] continued, the Company would be subject to the Act and to the Commission's order." 324 U.S. at 518.

Pennsylvania Water & Power Co. v. *Federal Power Commission,* 343 U.S. 414 (1952) similarly supports the Commission's position in the instant case. There, as in our case, the company contended that some of its sales at wholesale were not in interstate commerce and therefore not subject to federal regulation. Although the company's

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[6] The effective date of the Federal Power Act.

sales to its Pennsylvania customers involved almost 83% Pennsylvania generated power, the record conclusively showed that with the ebb of the Susquehanna River Pennsylvania Water & Power Company (Penn Water) received steam-generated energy from Baltimore, Maryland in order to meet its power supply commitments; conversely, with the high flow of the river, Consolidated Gas Electric Light and Power Company of Baltimore (one of Penn Water's customers) was able to receive cheaper hydroelectric power from Penn Water and Safe Harbor Water Corporation. Each of these three companies operated under contracts for the coordinated sale and distribution of electric power in Maryland and Pennsylvania. In the words of the Supreme Court the result was:

> "a complete integration and pooling of the power producing and trasmitting facilities of the three companies * * *." 343 U.S. at 420.

Contrary to the company's contention the Commission found:

> "The central fact disclosed by the record about Penn Water's sales in Pennsylvania is that they are not sales of the output of Penn Water's own plant, but sales of output of the integrated and coordinated interstate electric system of which Penn Water's facilities are an integral part. * * *"
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> * * * * * * * *
>
> "* * * Energy flows in, across and out of the system transmission network as the needs of the interconnected members develop from minute to minute and day to day.
>
> "It is accordingly evident that the operations of the unified system enterprise are completely interstate in character, notwithstanding the fact that system energy transactions at some particular times may involve energy never crossing the State boundary." 8 F.P.C. at 12, 15.

The Supreme Court in affirming the Commission stated:

> "We hold that the Federal Power Commission has complete authority to regulate all of this commingled power flow. The Commission's power does not vary with the rise and fall of the Susquehanna River." 343 U. S. at 420.

California v. *Lo-Vaca Gathering Co.*, 379 U.S. 366 (1965), though dealing with the flow of natural gas, nevertheless seems to lend credence to the Commission's position. In that case the Supreme Court reiterated its holding in the natural gas cases that once it is determined that gas crosses a state line at any stage of its movement towards the ultimate consumer and is intended to be resold, federal jurisdiction is invoked at the outset of the entire transaction.

In *Wisconsin-Michigan Power Co.* v. *Federal Power Commission*, 197 F.2d 472 (7th Cir. 1952), cert. denied, 345 U.S. 934 (1953), the Seventh Circuit in affirming the Commission relied upon the basic nature of the interstate transfers of energy. The integrated operations of the *Wisconsin-Michigan Power Co.* bore a striking resemblance to those in the instant case. Its twelve steam and hydroelectric plants and one diesel plant located throughout the states of Wisconsin and Michigan were interconnected and coordinated to provide the maximum amount of voltage at the least possible cost. Thus, where a Michigan plant's production fell below a certain level, it was supplemented by Wisconsin generated energy transmitted over the interconnecting line. The converse was similarly true as to the importation of Michigan generated electric energy. From a review of these operations, the court found "the essential fact in this respect is that, in this coordinated operation, electric energy is transmitted from Michigan to

Wisconsin and from Wisconsin to Michigan in appreciable amounts by the power company and by it commingled with energy generated in the two respective districts and then delivered to the customers here involved." 197 F.2d at 474.

We do not detect any valid distinguishing feature between *Indiana & Michigan Electric Company* v. *Federal Power Commission*, ... F.2d ... (July 13, 1966), and the facts relied upon to establish jurisdiction over the sales in issue here. In *Indiana & Michigan*, as is true in our case, the petitioner insisted that in order to invoke jurisdiction the Commission was required to prove by substantial scientific and engineering evidence that out-of-state energy flows to each sale in issue and that these sales are not made over facilities used in local distribution. In deciding the jurisdictional question the court stated:

> "We think the proof before the Commission was sufficient to show that out-of-state energy reached all of the wholesale customers. True, point to point tracing was impossible. This kind of tracing requires automotic [sic] recording meters at various points on the system and I&M does not need and does not have such meters. Hence, I&M insists that this kind of proof is not possible on their system, and that no other kind or type of proof can be sufficient."
>
> "We think the Commission was justified in holding that the important consideration in determining jurisdiction here is the integrated interstate pool character of the operation. • • •
>
> "The unpredictable and free-flow of energy in the System in response to any number of constantly changing occurrences, makes it certain, in the view of the Federal Power Commission that out-of-state energy received by I&M at a number of points at or near its eastern, southern or western borders, at one time or another, reaches each of I&M's wholesale customers." ... F.2d at .....

The recent case of *Louisiana Public Service Commission* v. *Federal Power Commission*, ... F.2d ..., (5th Cir., April 6, 1966), also sheds light upon this question. There the issue was squarely presented "whether the sales of natural gas at wholesale by a pipeline company from its integrated, interstate pipeline system are sales at wholesale in interstate commerce within the meaning of the Natural Gas Act, where such sales are made within the state where the gas is produced, for ultimate public consumption therein, but the gas so sold comes from an admixture of gas, some of which is destined for transportation to and consumption in other states." In holding that such sales came within the regulatory jurisdiction of the Federal Power Commission, the Fifth Circuit took cognizance of the opinions of the Supreme Court in gas cases holding in effect "that the mixing of intrastate gas with a substantial portion of interstate gas for pipeline transportation in one commingled stream gave the Commission jurisdiction 'at the outset over the entire transaction'." ... F.2d at ....

Although the Commission had the burden of proving that interstate energy was involved, we do not adopt the concept that the only method of discharging such burden was by resort to tracing techniques. Logic would seem to dictate that where the utility is a member of a combination of utilities and has continuous access to an integrated pool of interstate energy, the tracing of out-of-state energy is indeed difficult, burdensome, and perhaps impossible. The Commission in the exercise of its expertise judgment pertinently observed:

> "An interstate electric network is dynamic and ever changing both with respect to load and to generation source. It is an oversimplification, therefore, to talk in terms of a flow of electricity from point to point

> in an integrated power network of the type involved here. Instead, generation from each source in the system contributes directly or indirectly, and to an ever varying extent, to the energy present in all parts of the system which are not isolated from out-of-state energy sources. The fact that, as a matter of engineering determination, identification of either the source or destination of particular units of energy within an interstate power system such as respondent's [Arkansas] may be difficult and at times impossible does not detract from the interstate nature of the over-all operation. On the contrary the more complex and comprehensive the nature of the interstate network, the more unlikely it will be that any energy sources will be measurably identifiable. The use of tracing to disprove that a particular sale of a company which is part of an electrically integrated interstate system is in interstate commerce is a wholly unrealistic methodology which is irrelevant to present day power system technology." 34 F.P.C. at ....

In summary we believe that the Commission applied the proper legal principles and that the record, as a whole, demonstrates substantial evidence in support of the finding that interstate energy was supplied to all of Arkansas' twenty-three wholesale customers.

Arkansas also contends that none of the sales under consideration can be subject to the Commission's jurisdiction because each of them is made from "facilities used in local distribution."[7]

On this record the local distribution exemption is inapplicable. The Commission felt that evidence concerning

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7 Section 201 (b) 49 Stat. 847 (1935), 16 U.S.C. § 824 (b) (1960), provides in pertinent part: "The provisions of * * * [Part II—Regulation of Companies Engaged in Interstate Commerce] shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce * * *. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction * * * over * * * facilities used in local distribution * * *."

the nature of the lines extending from Arkansas' substations to its twenty-three customers was irrelevant. It adhered to its position in *Indiana & Michigan*, 33 F.P.C. 739 (1965), namely, that where a company is in fact a public utility, all wholesale sales for resale in interstate commerce are subject to the provisions of Sections 205 and 206 of the Act, regardless of the facilities used.

The Seventh Circuit, in affirming the *Indiana & Michigan* case, held that the Section 201 (b) exemption applies to a company's status as a public utility and not to the Commission's jurisdiction over sales in interstate commerce for resale. Arkansas' argument is also rejected by *United States* v. *Public Utilities Commission*, 345 U.S. 295, 316-17 (1953). See also *Federal Power Commission* v. *Southern California Edison Co.* (*Colton* case), *supra*; *Wisconsin-Michigan Power Co.* v. *Federal Power Commission*, *supra*; *Wisconsin* v. *Federal Power Commission*, 201 F.2d 183, 185 (D.C. Cir. 1952), cert. denied, 345 U.S. 934 (1953). Nor does *Connecticut Light & Power Co.* v. *Federal Power Commission*, *supra*, require a different result.[8]

We are also mindful of Justice Brennan's observation appearing in footnote 6 of his opinion in the *Colton* case, *supra*, that "whether facilities are used in local distribution * * * involves a question of fact to be decided by the FPC as an original matter." 376 U.S. at 210. Although the Commission stated in this case that evidence concerning the nature of the lines was not relevant, it did make a finding on this issue and thereby complied with the teachings of the *Colton* case. Thus it held:

> "* * * that facilities other than those leading directly to the connection with the customer are involved in

[8] As we have observed, *supra*, the Connecticut case presented the question whether the company was in fact a public utility, a question not in this case. Clearly, this is a distinguishing feature.

> the sale, and many of these facilities are clearly jurisdictional. Furthermore, the fact that a company may make a few direct sales off a line transmitting power to a wholesale customer does not convert the line into a local distribution facility. [Citing the *Colton* case]. In fact, 'at no point before delivery [to a wholesaler] has been completed has interstate transmission terminated,' and 'there is no ground for the position that local distribution includes any transmission occurring before the wholesaler who sells at retail is reached'." (Citing *Wisconsin-Michigan Power Co.* v. *Federal Power Commission, supra*).

Petitioner also raises other subsidiary issues, resolution of which is not difficult. The first relates to its contention that the state of Arkansas can constitutionally regulate the intrastate wholesale sales to its twenty-three customers, if in fact there is more than enough generation by petitioner within Arkansas to cover such sales. In view of our affirmation of the Commission's findings that each of petitioner's sales to its twenty-three customers involves interstate energy, we find petitioner's contention well settled by *Public Utilities Commission* v. *Attleboro Steam & Electric Company*, 273 U.S. 83 (1927), which held that state regulation of sales in interstate commerce constituted a direct burden on interstate commerce. Federal regulation of sales for resale under Section 201 of the Federal Power Act thus precludes concurrent state jurisdiction. *United States* v. *Public Utilities Commission, supra*. Moreover, the fact that the volume of interstate energy passing over Arkansas' transmission lines may at times be small in comparison with its intrastate generated energy is a factor which Congress has left to the discretion of the Commission in determining whether to exercise its jurisdiction. The courts will not construct a jurisdictional limitation on the amount of interstate energy involved.

Connecticut Light & Power Co. v. *Federal Power Commission, supra.*

Lastly, petitioner argues that the Commission erred in finding that its sales to fourteen electric cooperatives are sales at wholesale for resale within the meaning of Section 201 (b) of the Act. It premises this contention on the basis that the relationship between a cooperative association and its members is not that of buyer and seller but rather one of principal and agent. Irrespective of how this relationship is characterized, we find nothing in the language of Section 201 which would warrant excluding such cooperative associations and their members from the ambit of its coverage.

Section 201 (d), 49 Stat. 847 (1935), 16 U.S.C. § 824 (d) (1960), states in pertinent part that:

> "The term 'sale of electric energy at wholesale' * * * means a sale of electric energy to any *person* for resale." [Emphasis added].

The definitional section of the Act, § 3 (3)[9] and 3 (4),[10] indicate that the term "person" was intended to have a very comprehensive meaning. The term has similarly been broadly interpreted by the courts to encompass the Commission's authority over the rates of sales to municipalities. *United States* v. *Public Utilities Commission, supra; Wisconsin-Michigan Power Co.* v. *Federal Power Commission, supra.* We hold the inclusion of cooperative associations within the term "person" to be a permissible

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9 § 3 (3), 49 Stat. 838 (1935), 16 U.S.C. § 796 (3) (1960): "Corporation" means any corporation, joint-stock company, partnership, association, business trust, organized group of persons, whether incorporated or not, or a receiver or receivers, trustee or trustees of any of the foregoing. It shall not include "municipalities" as hereinafter defined.

10 § 3 (4), 49 Stat. 838 (1935), 16 U.S.C. § 796 (4) (1960): "Person" means an individual or a corporation.

administrative interpretation, and therefore reject the petitioner's argument on this point. *United States* v. *Public Utilities Commission, supra,* at 314-15.

The order of the Commission is accordingly affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

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October Term, 1966

No. 646

INDIANA & MICHIGAN ELECTRIC COMPANY,
Petitioner,

against

FEDERAL POWER COMMISSION,
Respondent.

PETITIONER'S REPLY TO BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

RICHARD M. DICKE
ROLON W. REED
ANTHONY L. FLETCHER
Attorneys for Petitioner
120 Broadway
New York, New York 10005

SIMPSON THACHER & BARTLETT,
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The Brief in Opposition (pp. 4-5) claims that the Commission "expressly found" on the basis of Staff-sponsored "flow studies, that out-of-state energy was in fact received by all of petitioner's wholesale customers." As to Petitioner's Indiana customers, however, no such finding was made because any such finding was impossible on the record. As the Commission said in its opinion:

> "The network of generators and high voltage transmission lines extending over seven states is only the visible evidence of the pool in which currents changing from minute to minute can be measured but where often *there is no way to determine,* or need to determine, *the way the needs of each power customer will be supplied.*" (R. 16545, emphasis added.)

Finding No. 2 of the Commission's decision expressly grounded the assertion of Federal sales jurisdiction on Petitioner's status as a member of the American Electric Power System, and not on any conclusion as to the flow of electric energy (R. 16551).* The basis of this finding is directly contrary to Section 201(c) of the Federal Power Act** and directly in conflict with the cases† construing that Act.

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*"(2) IM is a member of the power pool composed of several companies further organized into the AEP system and such pool is an integrated and coordinated interstate electric system, and the sales of system energy, such as those by IM to the 24 municipals and co-operatives referred to in (3) below, are pool sales, and hence, in the light of the interstate nature of the pool are sales in the interstate commerce."

**"* * * electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof * * *."

† Contrary to the claim at pages 6 and 7 of the Brief in Opposition, no case decided prior to the Commission's decision below embraces, endorses or supports the test the Commission now urges, as the Commission itself recognized in its decision:

> "* * * In every previous case sales for resale from integrated, interstate pools have been found jurisdictional, and *in each case, this finding has been supported by evidence purporting to trace out-of-State energy to each of the sales involved* or facts from which such a conclusion could be reasonably inferred." (R. 16540, emphasis added.)

Such support was present in *Penn Water*, where the evidence showed (see FPC Brief to this Court, p. 108, n. 71) and this Court took note (343 U. S. at 420) that the wholesale customers in Pennsylvania received energy generated wholly in Maryland for substantial periods of time. In the *Public Utilities Commission of California* case, there was no question that the power sold to wholesale customers in Nevada had been generated entirely in California (345 U. S. at 297). In *Wisconsin-Michigan*, the company conceded that energy generated out of state was sold to its wholesale customers in both Wisconsin and Michigan (10 F. P. C. at 174-75). Similarly, in the *State of Wisconsin* case, "the company affirmatively stated that the power then being sold to the municipalities [in Wisconsin] was coming in part from Illinois * * *" (210 F. 2d at 187).

As this Court most recently explained the proper jurisdictional test:

> "We said * * * 'Federal jurisdiction was to follow the flow of electric energy, an engineering and scientific * * * test.' And that is the test we have followed under * * * the Federal Power Act. * * *" *California* v. *LoVaca Gathering Co.*, 379 U. S. 366, 369 (1965).

The so-called Staff "flow studies" were not studies of the flow of electric energy at all. Instead, they consisted of testimony (a) identifying receipts of out-of-state energy at the state line and (b) assuming that some of this energy reached every point on Petitioner's electric system without any further analysis of meter readings and without any analysis of the electric facilities intervening between the point of out-of-state receipt and the point of sale (R. 1092, 1782-1783).

This testimony concededly involved concepts rather than facts (R. 2111). To its sponsoring witness, it did not afford an adequate or independent basis for determining the physical realities of energy flow, but only a rough method used to check some of the ideas he had earlier advanced about integrated electric systems (R. 1706-14, 2059). The witness conceded that his approach has not been accepted by anyone (R. 2143), that it is not scientific* (R. 1829), and that it ignores the physical dimensions of the electric conductors involved and the arrangement of the

* Far from seeking "internal Commission memoranda" (Brief in Opp., p. 9), Petitioner in its discovery motions sought engineering studies and other written applications of a proper scientific approach to this problem known to be in the possession of the Commission or its Staff for the purpose of demonstrating that a truly scientific approach to this case by the Commission's own experts would have produced and previously had produced a conclusion that these sales are in intrastate commerce.

intervening circuity (R. 1825-26), even though such dimensions and such arrangement could definitely affect the results of a careful effort to establish the flow of electric energy (R. 1829):

The receipts at the state line of out-of state energy identified at R. 1082-1093 all relate to certain hours when (1) except for the city of Richmond, there is no showing in the record that any customer in issue was actually receiving energy, and (2) it is undisputed that Petitioner's Indiana generation exceeded the maximum combined demands of all the customers in issue (R. 1271-84, 3032-36). These hourly readings were specifically appraised by FPC's sole engineering witness as follows: "The data, such as it is, do not even suggest or tell what happened[*] during the hour for which the data were used." (R. 1785)

In this case the Commission has no substantial scientific or engineering evidence as to the flow of electric energy. It has instead relied on its presumed expertise and on its previous victories on appeal of sales jurisdiction cases. This presumption and these victories, however, do not relieve the Commission of its continuing obligation to rely on substantial evidence when it determines to oust a State Commission (Indiana) of jurisdiction over local sales which it has regulated for more than 40 years.

In *Rochester Gas & Elec. Corp.* v. *FPC*, 344 F. 2d 594 (2d Cir. 1965), the Commission had denied a company's application for a declaratory order that certain hydro-

* This is the type of data to which the following statement from the Brief in Opposition (p. 9) refers:

"Petitioner had in its possession the essential factual data about its operations without which the proceeding could not have been conducted."

electric projects did not require licensing, because in the exercise of its expertise it had decided that those projects were on navigable waters.

The Court, with all due allowance for the Commission's expertise, could not find that the Commission's conclusions were supported by substantial evidence and reversed, saying:

> "The Commission notes that none of its previous findings of navigability have ever been set aside by the courts. We congratulate the Commission on its achievement, which is undoubtedly attributable to the full factual foundation on which its findings have heretofore been based. This successful performance, however, does not relieve the Commission of the continuing obligation to rely on evidence that is substantial when it determines that a river is navigable." (344 F. 2d at 596)

In the absence of any such "full factual foundation" for the Commission's determination of jurisdiction here, the Court below should have reversed in accordance with the dissenting opinion.

Conclusion

For the reasons stated therein the petition for a writ of certiorari should be granted.

Respectfully submitted,

RICHARD M. DICKE
ROLON W. REED
ANTHONY L. FLETCHER
Attorneys for Petitioner
120 Broadway
New York, New York 10005

SIMPSON THACHER & BARTLETT,
Of Counsel